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No. 79-870

In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES RAILROAD RETIREMENT BOARD,
APPELLANT

GERHARD H. FRITZ,
On behalf of himself and all others similarly situated,
APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

BRIEF OF T. W. SMITH, *ET AL*, AS AMICUS CURIAE

Steven F. Bright
Gary E. Smith
Graham & Bright
8350 N. Central Expressway
Suite M-2212
Dallas, Texas 75206

Counsel for T. W. Smith, *et al*, as Amicus Curiae

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By consent of Appellant and Appellees submitted herewith, T. W. Smith, *et al*, file this brief as amicus curiae.

INTEREST OF THE AMICUS CURIAE

The amicus curiae, T.W. Smith, E.P. Gray, V.W. Baulch, John J. Kocian, Archie Dewees, L.C. Story, W.S. Smith, A.E. Morris, L.E. Frank, J.J. Herndon, E.J. Le Blanc, W.A. McMichael, W.A. King, S.A. Keasler and V.W. Walker, have an interest in this case in that they are Plaintiffs in a case now pending in the

U.S. District Court for the Northern District of Texas, Dallas Division, styled T.W. Smith, *et al* v. William P. Adams, Chairman, United States Railroad Retirement Board, CA3-78-0236-G. The question presented in that case is the same as the question presented in this appeal. That case has been stayed until final disposition is made of this appeal. The amicus curiae are not members of the certified class only because they have not yet retired. The interests of the amicus curiae are typical of those of literally thousands of former railroaders who have been divested of their earned retirement benefits by the enactment of the Railroad Retirement Act of 1974.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional and statutory provisions involved are set out in the Brief for the Appellant.

QUESTION PRESENTED

Whether Section 3(h) of the Railroad Retirement Act of 1974, 45 U.S.C. 231b(h), violates the Due Process Clause of the Fifth Amendment because it divests Appellees of benefits to which they were entitled under the Railroad Retirement Act of 1937 on a basis which is arbitrary, capricious, and irrational.

STATEMENT

The Railroad Retirement Act of 1974, 45 U.S.C. 231 *et seq.* (hereinafter referred to as the "1974 Act"), was enacted as a response to concerns about the financial stability of the Railroad Retirement Fund established by the Railroad Retirement Act of 1937, 45 U.S.C.

228(a) *et seq.* superceded by 45 U.S.C. 231 *et seq.* (hereinafter referred to as the "1937 Act"). The Railroad Retirement System's financial difficulty was recognized in 1970, at which time the Commission on Railroad Retirement (hereinafter referred to as the "Commission") was created by Congress to study the problems. Pub. L. No. 91-377, Section 7, 84 Stat., (Aug. 12, 1970). The written report was received by Congress on September 3, 1972, and such report dealt with the financial instability of the Railroad Retirement System, and proposed certain means for correcting that instability.

After the Commission submitted its written report, Congress requested representatives of the railroad unions and representatives of management of the railroad carriers to submit recommendations to the House and Senate regarding reforms of the 1937 Act. No recommendations were sought (nor have any ever been sought) from any representative of the Appellees. Prior to the time that the Commission began preparing its reports, the employers for all Appellees herein or the Appellees themselves had withdrawn from participation in the Railroad Retirement System. However, at such time all Appellees had contributed to the Railroad Retirement System for more than ten years, but less than twenty-five years, and under the terms of the 1937 Act, had a fully vested right to retirement benefits subject only to reaching the applicable retirement age and filing the appropriate applications.

Based upon the recommendations of the Commission, the railroad unions and railroad management, the 1974 Act was enacted on October 16, 1974, and became effective January 1, 1975. The revisions in the law made by the 1974 Act substantially decreased the benefits to which the Appellees were entitled under

the 1937 Act without effecting the benefits of other classes of railroad employees. In some cases, the 1974 Act even increased benefits to which other classes are now entitled.

It is obvious from the legislative history of the 1974 Act that the Appellees, as former railroad employees not being currently members of any railroad union, were not notified of the Commission's reports and their interests were totally ignored, except to the extent that the benefits due them from the Railroad Retirement Fund were drastically reduced in order to maintain levels of benefits equal to or greater than those already available to employees still connected with the industry.

The 1974 Act combined the benefit systems of the 1937 Act and the Social Security System in such a fashion that railroad employees, such as the Appellees herein, are no longer entitled to benefits under both programs even though they had been assured for years by the Appellant that both programs were available to them and had been further assured that substantial and full retirement benefits of a vested nature would flow from their employment under and payment into the two programs.

A summation of the 1974 Act and its effect on the Appellees is as follows:

1. The Appellees constitute a group of former railroad employees who, as of December 31, 1974, had more than ten but less than twenty-five years of credited railroad service, but who were not directly connected with the railroad industry as of December 31, 1974.

2. All railroad employees, former and present, who were classified as vested under the 1937 Act will, by means of the 1974 Act, receive those benefits to which they were entitled under the 1937 Act, except for the Appellees.

3. The Appellees have lost the benefits to which they were entitled under the 1937 Act by reason of the additional requirements the 1974 Act placed upon the Appellees for qualification to receive the benefits to which they were entitled under the 1937 Act. Those additional requirements, none of which the Appellees can comply with, are (i) twenty-five years of railroad service prior to 1975, or (ii) permanent insured status under the Social Security Act, 42 U.S.C. 401 *et seq.* prior to 1975, and on the date that they left active railroad service.

Under this statutory scheme, a former railroad employee situated as the Appellees herein, with twenty-four years of railroad service, will lose his vested benefits under the 1937 Act. At the same time, a railroad employee with only ten years of service as of December 31, 1974, and "currently connected" with the industry, will be entitled to full credit for his railroad employment and, in effect, receive much higher benefits in accordance with the provisions of the 1937 Act.

SUMMARY OF ARGUMENT

Arbitrary, capricious and irrational discrimination violates the United States Constitution. The 1974 Act discriminates against Appellees in such a manner because it divests them of benefits to which they were eligible under the 1937 Act without rational basis.

Under the 1937 Act, Appellees were eligible for both Social Security and Railroad Retirement benefits. The 1974 Act eliminated these dual benefits for Appellees by providing that Social Security benefits be offset against Railroad Retirement benefits. Dual benefits are retained, however, for employees who had a "current connection" with the

railroad industry as of December 31, 1974. Appellees have earned, paid for and relied upon the benefits of which they are now divested.

One of the stated purposes of the 1937 Act was to provide security for Railroad workers whose private pension benefits were discretionary. The Commission recognized this purpose when it recommended to Congress that persons with legally vested dual benefits (i.e., Appellees) be allowed to receive them. However, a Joint Labor-Management Railroad Retirement Negotiating Committee (hereinafter referred to as the "Committee") composed of representatives of railroad workers with a "current connection" with the railroad industry submitted a report to Congress which eliminated Appellees' benefits but retained full benefits for those with a "current connection" with the industry.

The sole intent of the 1974 Act was to make the Railroad Retirement fund actuarially sound with due regard for the equities of vested beneficiaries. However, the 1974 Act has the effect of totally divesting Appellees of vested benefits while totally preserving vested benefits for those persons "currently connected" with the Railroad industry. Discriminating against Appellees on this basis is not rational in light of the intent of the 1974 Act.

ARGUMENT

Arbitrary, capricious and irrational discrimination against any class of persons is prohibited by the Equal Protection component of the Due Process Clause of the Fifth Amendment to the United States Constitution. *Califano v. Goldfarb*, 430 U.S. 199 (1977). The 1974 Act arbitrarily, capriciously and irrationally discriminates against Appellees. No rational basis exists

for divesting these former railroaders of their benefits vested under the 1937 Act. Appellees, on or before December 31, 1974, had satisfied all of the eligibility requirements for benefits under the 1937 Act in that they had completed at least ten years of service on that date and were entitled to receive a retirement annuity pursuant to the 1937 Act upon reaching the applicable retirement age and filing the appropritate application. All Appellees have also satisfied the elegibility requirements under the Social Security Act and are also entitled to Social Security benefits upon reaching the applicable retirement age and filing the appropriate application.

Under the 1937 Act, an individual engaging in covered employment under both the 1937 Act and the Social Security Act was entitled to benefits under both acts if he had sufficient credits under each act to meet at least the minimum requriements for benefit eligibility. The Appellees have sufficient credits under both Acts to be entitled to benefits under both Acts upon reaching the applicable retirement age. The 1974 Act eliminated the dual benefits provided by the 1937 Act and the Social Security Act by providing that Social Security benefits would be an offset against Railroad Retirement benefits in computing benefits. Dual benefits would be retained under the 1974 Act through the payment of an additional amount of so-called "windfall" benefits to those railroaders and former railroad employees meeting certain vesting requirements under the terms of the 1974 Act which are different than those of the 1937 Act.

Appellees, although having met all requirements under the 1937 Act, do not meet the additional vesting requirements imposed by the 1974 Act for "windfall" dual benefits, and have thus been deprived of a valuable vested interest guaranteed to them under the 1937 Act.

The Appellees contributed to the Railroad Retirement Fund for many years and under the terms of the 1937 Act, justifiably expected to receive amounts greatly in excess of those to which they are now relegated under the 1974 Act.

In 1977 this Court rendered its decision in *Califano v. Goldfarb*, 430 U.S. 199 (1977), which was a suit challenging the survivors' benefits provisions under the Federal Old Age Survivors and Disability Insurance Benefits (OASDI) program of the Social Security Act, 42 U.S.C. 401-431. Perhaps more than any other Supreme Court ruling, the language in this case enunciates the principals surrounding the Equal Protection component of the Due Process Clause of the Fifth Amendment.

In *Goldfarb*, the issue concerned the constitutionality of Section 402(f)(1)(D) of the Social Security Act, 42 U.S.C. 402(f)(1)(D). Under the Act, survivors' benefits based on the earnings of a deceased husband covered by the Act were payable to his widow regardless of dependency, but under the aforementioned section such benefits on the basis of the earnings of a deceased wife covered by the Act were payable to her widower only if he was receiving at least half of his support from her upon her death. In holding this provision of the Social Security Act an unconstitutional denial of equal protection, the Court, quoting from *Weinberger v. Wiesinfeld*, 420 U.S. 636 (1975), Stated the following:

> . . . Wiesenfeld held that the fact that the interest is "non-contractual" does not mean that "a covered employee has no right whatever to be treated equally with other employees as regards the benefits which flow from that employment."

Califano v. Goldfarb, 430 U.S. 199, 211, and 212 (1977)

The 1974 Act is in direct contravention of the Court's holding in *Wiesenfeld* and *Goldfarb*. The 1974 Act has the effect of depriving one group of employees of substantial benefits while maintaining those benefits for others who have contributed no more than the Appellees.

By way of example, under the 1937 Act if two employees had served in the railroad industry for twenty years as of 1974, they would be entitled to equal benefits upon their retirement. The 1974 Act destroyed such equal treatment by adding, after the fact, the additional vesting requirements referred to above and has substantially reduced the benefits payable to the Appelles even though, as of 1974, they had contributed the exact amount of money as their contemporaries who had a "current connection" with the railroad industry in 1974.

Furthermore, one of the stated purposes of the 1937 Act was to provide security to railroad workers whose benefits under private pension programs had frequently been treated as discretionary payments. See H.R. Rep. No. 1711, 74th Cong., 1st Sess., 10-11, (1935).

> The drafters of the original legislation expressly stated that one of the important features of any retirement plan was a guarantee to the worker of an 'absolute' right to receive the pension.

See also *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979).

Congress, by the enactment of the 1974 Act, has defeated the express purpose of the 1937 Act and has undertaken to treat as discretionary the benefits to which the Appellees were entitled under the 1937 Act.

Although there has been no express holding that former railroad employees may be divested of accrued

benefits under the 1937 Act, the court below has applied the rational basis test to its determination of whether or not the 1974 Act violates the Due Process Clause and its incorporated Equal Protection guarantee. The rational basis test was first announced in the case of *Flemming v. Nestor*, 363 U.S. 603 (1960). Although the Railroad Retirement Act, unlike the Social Security Act, contains no express provision permitting Congress to terminate it, and, therefore, should be the subject of a much more stringent test than the rational basis test, assuming arguendo, that the rational basis test is the proper test to be applied in the instant case, a review of the 1974 Act clearly demonstrates that no rational basis exists for divesting Appellees of their vested benefits under the 1937 Act while maintaining such benefits for all other present and former employees.

As stated previously, a Commission on Railroad Retirement was created under the direction of Congress in 1970 to study the actuarial soundness of the Railroad Retirement Fund. Pub. L. No. 91-377, Section 7, 84 Stat. 791.

The Commission recommended that the Railroad Retirement System and the Social Security program be more closely coordinated, and that dual benefits under the Railroad Retirement and Social Security Act, *in the future*, be eliminated and that only present beneficiaries and those with legally vested dual benefit rights be allowed to receive dual benefits. The Appellees, having qualified for benefits under both acts, were naturally included in those beneficiaries held to have legally vested benefits. Commission on Railroad Retirement, *The Railroad Retirement System: Its Coming Crisis*, H.R. Doc. No. 92-350, 92d Cong., 2d Sess. (1972). In its report the Commission made the following specific recommendations with

regard to those legally vested dual benefit rights to include the Appellees:

> Recommendation 9-2: (a) the following principals with respect to vested rights should be followed in instituting changes to eliminate further accrual of rights to windfalls in dual OASDI benefits on the basis of future service:
>
> (1) Individuals or families on beneficiary rolls should be permitted to continue to receive the present dollar amounts of their RR and OASDI benefits, but the RR staff portion of their benefits should not be subsequently increased as long as this guaranteed portion exceeds the amount which would be yielded for the same service and average pay under the new formula. They should, however, be allowed all increases provided by the Congress on the basic OASDI portion of their benefits.
>
> (2) Individuals who are permanently or fully insured under Social Security, and are or will be eligible to retire under Railroad Retirement within a year should have a reasonable opportunity to exercise such rights. If they exercise them they should be treated the same as those under point 1.
>
> (3) Individuals who have vested rights to Social Security benefits by virtue of permanently or fully insured status, but cannot exercise them because they are not at retirement age under Railroad Retirement , should be guaranteed an equivalent right in dollar terms to the staff tier portion of their benefits, including vested dual benefits, as described in Chapter 11. However, the

> Railroad Retirement staff tier portion of such guaranteed benefits should not be subsequently adjusted as long as it exceeds the benefits under the new staff tier formula. If the new second or staff tier Railroad Retirement formula then in effect provides a more attractive benefit, they should be permitted to elect the new formula benefits.

Had the 1974 Act been written upon the basis of the recommendations of the Commission as outlined above, the Appellees would be receiving the benefits to which they are entitled.

The 1937 Act stood as a guarantee to American railroad workers from their government that retirement benefits counted on, earned and paid for over the years would not be taken from them. The Commission recognized and was faithful to this commitment in its recommendation to Congress. Yet, when the 1974 Act became law, Appellees found themselves singled out to be stripped of previously vested retirement benefits. How did such an inequity come about? Here's how.

After the filing of the Commission's final report, the Committee, composed of representatives of railroad labor and management (all with a "current connection" with the industry), was formed to prepare and submit a report to Congress. No representatives of the Appellees were asked to participate in the preparation of this report and its contents could have been easily predicted. As one would expect, this report recommended that Appellees' benefits be completely eliminated while full benefits for those "currently connected" with the industry (i.e. those whose representatives prepared the report), were maintained or increased.

The Chief Negotiator, while effectively divesting the Appellees of what the representatives of management termed "legally vested rights", called such divestiture "a refinement upon the recommendations of the Commission." H.R. 15301, 93rd Cong., 2d Sess. 164 (1974), at 168.

In part he stated:

> The first group would be comprised of those employees with a 'current connection' with the railroad industry — 12 months of railroad service out of the previous 30 months as defined in the 1937 Act and in the bill — either as of December 31, 1974 or as of the date of retirement, and also of those employees with 25 years or more of railroad service even though without such a 'current connection'. The Joint Negotiating Committee concluded that the service with and attachment to the railroad industry of such employees are sufficient to afford them an equity in windfall dual benefits substantially equivalent to the equity of existing beneficiaries. Accordingly, under the bill this group also would receive, upon retirement, a windfall benefit based upon service and compensation prior to January 1, 1975. The amount thus determined would be subject to increase prior to retirement by reason of cost-of-living increases in the level of social security benefits during that intervening period, but would be frozen upon retirement, as would be done in the case of dual beneficiaries retired as of December 31, 1974.
>
> The second group would be comprised of employees who, after qualifying for benefits under the Railroad Retirement Act, left the railroad industry without having 25 years of railroad service and who do not now have a current connection

> to the railroad industry. Such employees, the Joint Negotiating Committee believed, have a lesser equitable claim than those who have remained with the railroad industry. Accordingly, under the bill they would not receive a windfall dual benefit, upon retirement, unless they also had fully qualified under Social Security by the close of the year in which they left railroad service (although they would be entitled to the lump-sum benefit refunding excess employment taxes paid.) If they had so qualified under both systems at that point, however, they would receive a windfall benefit, upon retirement, calculated as of the time they left railroad service, and subject to cost-of-living increases in the level of social security benefits after 1974 and prior to retirement. That windfall benefit would be frozen upon retirement, as in the case of other dual beneficiaries.

This self-serving "logic" resulted in the inequities which are now before this Court for rectification. Men and women who have contributed to the Railroad Retirement Fund for up to twenty-four years but who did not have a "current connection" with the railroad industry as of 1974 have been divested of earned and expected benefits upon which they and their families have relied. At the same time, persons who have contributed substantially less time to railroading and money to the Railroad Retirement Fund as of December 31, 1974, but who as of such date had a "current connection" with the railroad industry, are termed to have a right more equitable than the Appellees. This result is not only irrational and inequitable, it is absurd.

Congressional discrimination against a class of persons, in order to pass constitutional muster, must have a rational relation to the purpose of the legislation and

cannot be arbitrary or capricious. Contrary to the undocumented assertions of Appellant, constructed after the fact to provide some rational basis for the inequities dealt to Appellees, the sole intent of the 1974 Act was to make the Railroad Retirement Fund actuarially sound with due regard to the relative equities of those beneficiaries whose interests had already vested under the terms of the 1937 Act, including Appellees. H.R. Doc. No. 92-350, 92d Cong., 2d Sess. (1972). How can it be logically argued that the equities of these beneficiaries have been recognized when the effect of the 1974 Act is to preserve, totally, the vested rights of one class of persons and to divest, totally, the rights of another class of person equally entitled to the same benefits?

Appellant would have the Court believe that the sole (and supposedly rational) basis upon which the Appellees have been divested of their rights under the 1937 Act is because, as of December 31, 1974, they did not have a "current connection" with the railroad industry. Using solely a "current connection" as the rational basis upon which to either continue or divest persons of accrued benefits leads to obviously ridiculous and inequitable results. For example, under the rationale imposed by the Appellant herein, an employee with ten years of service who had a "current connection" with the railroad industry as of December 31, 1974, would be entitled to full and dual benefits under both the Social Security and Railroad Retirement Funds. However, under the same rationale, a person with twenty-four years of railroad service, i.e. the Appellees, who happened to not have a "current connection" with the industry as of December 31, 1974, for whatever reason, have been completely divested of all of their accrued and vested rights under the 1937 Act which they have worked and paid for for periods of up to twenty-four years.

CONCLUSION

The sole intent of Congress when it passed the Railroad Retirement Act of 1974 was to render the Railroad Retirement Fund actuarially sound without inequity to those with vested benefits under the Railroad Retirement Act of 1937. Because of the self-serving recommendations of the Joint Labor-Management Railroad Retirement Negotiating Committee, Congress divested Appellees, as a class, of earned and vested benefits. The sole criterion for inclusion in this class is the lack of "current connection" with the railroad industry of December 31, 1974. The court below correctly held this discrimination against Appellees to be an arbitrary, capricious and irrational classification in direct violation of the Equal Protection component of the Due Process Clause of the Fifth Amendment to the United States Constitution. The judgement of the district court should be affirmed.

Respectfully submitted,

Steven F. Bright
Gary E. Smith
Graham & Bright
8350 N. Central Expressway
Suite M-2212
Dallas, Texas 75206

Counsel for T. W. Smith,
et al, as Amicus Curiae